Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN ENDRES,
Petitioner,

v.

INDIANA STATE POLICE,
Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Benjamin Endres, an officer with the Respondent Indiana State Police was assigned to a full time position as a Gaming Commission Agent at a private casino, performing specialized gambling-related duties that contravened his religious beliefs. Endres requested an accommodation, volunteering to take any other assignment that did not require him to perform acts that violated his religious beliefs, while still affirming that he would enforce general vice laws at casinos. Rather than attempting to accommodate Endres, however, Respondent terminated his employment. Accordingly, Endres presents the following question:

I. Are there any circumstances under which Title VII of the Civil Rights Act may require a law enforcement agency or other "paramilitary" employer to reasonably accommodate an employee's task-specific request for religious accommodation?

PARTIES TO THE PROCEEDING

The Petitioner in this matter is Benjamin P. Endres, Jr., an individual.

The Respondent is the Indiana State Police, the chief law enforcement agency of the State of Indiana.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Benjamin P. Endres, Jr. respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Benjamin P. Endres, Jr. and United States of America v. Indiana State Police*, 349 F.3d 922 (7th Cir. 2003).

OPINIONS BELOW

The opinion of the panel of the United States Court of Appeals for the Seventh Circuit is reported at 349 F.3d 922 (7th Cir. 2003), and is set out hereinafter as Appendix ("App.") A. This opinion was issued in response to Endres's motion for rehearing *en banc*. App. A1. The original opinion of the panel of the Court of Appeals, then consolidated with the decision in *Holmes v. Marion County Office of Family & Children*, is reported at 334 F.3d 618 (7th Cir. 2003). That opinion is set out hereinafter as App. B. The memorandum opinion and order of the United States District Court for the Northern District of Indiana is set out hereinafter as App. C.

STATEMENT OF JURISDICTION

The original judgment of the Court of Appeals was entered on June 27, 2003. App. B1. Endres's petition for reconsideration, or in the alternative for rehearing *en banc,* under Fed. R. App. Proc. 35 and 40, was filed on July 11, 2003, and was denied on November 19, 2003. App. A1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case is brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, which states, in pertinent part:

(a) Employer practices. It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion ....

42 U.S.C. § 2000e-2.

For the purposes of this title — ... (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

STATEMENT OF THE CASE

A. Nature Of The Case

Endres brought this action under the religious discrimination provisions of Title VII of the Civil Rights Act of 1964, alleging that his employer, Respondent Indiana State Police, engaged in prohibited religious discrimination by terminating his employment because he declined to accept a full-time assignment as a Gaming Commission Agent on a casino boat, where the performance of such responsibilities would have caused him to violate his sincerely held religious beliefs. App. A3.

B. The Facts

The District Court denied Respondent's motion to dismiss Endres's Title VII claim. App. C6. Thus, the only facts before the Court are those pleaded in Endres's complaint, attached as App. D.

Endres is an Indiana resident, formerly employed by Respondent Indiana State Police, an entity created and operating under the laws of the State of Indiana. App. D1. Respondent was vested by the State with the authority to establish official policy with respect to certain matters concerning job assignments and to make final decisions in regard to the implementation and execution of such policies, including policies involving job assignments. App. D2.

Endres was hired by Respondent and, shortly thereafter, successfully passed the necessary requirements and was certified as an Indiana State Trooper. App. D2. After Endres became an employee of Respondent, the Indiana Gaming Commission and Respondent entered into an agreement whereby Respondent's troopers would be assigned as full-time Gaming Commission Agents for the Commission. App. D2. Gaming Commission Agents are charged with gambling related responsibilities, including certifying gambling revenue, investigating complaints from the public about the gaming system, and conducting licensing investigations for the casinos and their employees. App. A3.

Endres is and was a member in good standing of the Community Baptist Church in South Bend, Indiana, a bona fide religious organization that holds as a tenet of its faith the position that gambling is a vice which is contrary to the principles of the Bible and that its members should not, in any way, participate in or

facilitate gambling. App. D2.

In March 2000, Endres was notified by Respondent of his full-time reassignment as a Gaming Commission Agent to the Blue Chip Casino, in Michigan City, Indiana. App. D3. Endres, both before and after receiving the official reassignment, informed Respondent that his religious convictions and beliefs would prevent him from accepting the reassignment as a Gaming Commission Agent. App. D3. Accordingly, Petitioner requested an alternative assignment, other than as a Gaming Commission Agent. App. D3.

Endres alleges that Respondent failed or refused to attempt to make any reasonable accommodation for his sincerely held religious beliefs. App. D3. Endres declined to report for his assigned position as a Gaming Commission Agent. App. D3. Thereafter, Endres was charged by Respondent with refusal to comply with a written order and insubordination, and subsequently terminated from his employment. App. D3.

C. The District Court's Judgment

On July 17, 2001, Endres filed a complaint against Respondent, invoking federal question jurisdiction under 28 U.S.C. § 1331. App. D1. In the complaint, Endres alleged that, by its failure to attempt to make any reasonable accommodation for his sincerely held religious beliefs and termination of his employment, Respondent engaged in unlawful employment discrimination against him on the basis of his religion in violation of 42 U.S.C. § 2000e. App. D3. Endres also brought claims under 42 U.S.C. § 1983 and claims for religious discrimination and breach of contract under Indiana law. App. D4.

Respondent moved to dismiss Endres's complaint for lack of

subject matter jurisdiction, arguing that his Title VII and state law claims were barred by Indiana's sovereign immunity. App. C2. The United States intervened to defend the constitutionality of the prohibition on discrimination on the basis of religion under Title VII. App. C2. The United States argued that in prohibiting state employers from discriminating against employees on the basis of religion, Congress had validly abrogated sovereign immunity pursuant to Section 5 of the Fourteenth Amendment.

On December 28, 2001, in an unpublished memorandum opinion and order, the District Court denied Respondent's motion to dismiss Endres's Title VII claim on the basis of sovereign immunity, but granted Respondent's motion to dismiss Endres's other claims. App. C8.

D. The Seventh Circuit's Original Opinion

Respondent took an interlocutory appeal from the District Court's denial of its motion to dismiss to the Court of Appeals for the Seventh Circuit. App. B2. The Seventh Circuit consolidated the *Endres* appeal with the appeal in *Holmes v. Marion County Office of Family & Children*, which involved another Title VII claim for religious accommodation against a state employer. App. B2.

The Seventh Circuit began the *Endres* portion of its opinion by correctly noting that Respondent's motion to dismiss Endres's complaint was based entirely upon its argument that it had sovereign immunity from Endres's Title VII religious discrimination claim in federal court. App. B2; *see also* App. C3. Despite this correct recitation of the Respondent's rationale in its motion to dismiss, the panel focused instead upon an issue not before the trial court and never presented by Respondent in its motion to dismiss. Rather than

addressing whether the trial court properly held that Indiana possessed sovereign immunity from Endres's claim in federal court, the Seventh Circuit panel held that a task-specific request for religious accommodation by an employee of a law enforcement agency or other "paramilitary" employer is *per se* unreasonable. App. B7.

The court began its analysis of the applicability of Title VII to law enforcement personnel like Endres, not by examining the text and history of Title VII, but by mischaracterizing Endres's request. *See* App. A11. Although Endres informed Respondent that he had no religious objection to enforcing general vice laws at casinos, App. A11, the panel asserted: "Endres contends that § 701(j) gives law-enforcement personnel a right to choose which laws they will enforce, and whom they will protect from crime." App. B4. Based on this misconstruction of Endres's request, and without reference to Title VII's provision that employers need not accommodate an employee's religious beliefs where doing so would impose an undue hardship on the employer, the court stated: "If Endres is right, [adherents of the Muslim, Baptist, and Catholic] faiths, and more, must be accommodated by assigning believers to duties compatible with their principles." App. B4. Despite Endres's notice to Respondent that he had no religious objection to enforcing general vice laws at casinos, App. A11, but sought merely to avoid the specialized gambling duties of a Gambling Commission Agent that are aimed directly at facilitating gambling, the court stated then that Endres's position — that Respondent, like all other employers, is bound by the religious accommodation requirements of Title VII — would have "prostitutes ... left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith." App. B4.

Its strawman conquered, the court noted that in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977), this Court held that Title VII does not require an employer to accommodate an employee's religion if such accommodation would impose more than a minimal hardship on the employer. App. B4. Although Respondent has never argued that it would incur an undue hardship by accommodating Endres, and although the only facts before the Seventh Circuit were those in Endres's complaint, the court speculated that "[j]uggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors." App. B5. The court then concluded that, as a matter of law, "[w]hether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship ... the demand would not be reasonable." App. B5.

To bolster its novel holding that all task-specific requests for religious accommodation by law enforcement officers are unreasonable *per se*, the Seventh Circuit cited two of its previous decisions, each of which differs from this case in the type and degree of accommodation sought. App. B5. Moreover, in both cases, the Seventh Circuit had held that the defendant law enforcement agencies had satisfied their obligations under Title VII to provide a reasonable accommodation for the employee's religion. App. A12. In neither case did the Seventh Circuit suggest, as it concluded in this case, that law enforcement agencies and other "paramilitary" employers are exempt from the religious accommodation provisions of Title VII.

The Seventh Circuit cited nothing in the text or history of Title VII for its conclusion that "paramilitary organizations" were not required, like all other employers, to reasonably accommodate an

employee's religion. App. A13. Nor did the court offer any clear explanation why such organizations, as opposed to other employers, should be exempted from the religious accommodation requirements of Title VII. The court simply asserted that "[l]aw-enforcement agencies need the cooperation of all members," a fact not in the record nor, if true, seemingly unique to "paramilitary" employers. App. B7.

E. The Seventh Circuit's Opinion On Request For Reconsideration

Endres filed a motion for rehearing and rehearing *en banc*. App. A1. The Seventh Circuit declined to rehear the *Endres* appeal, and instead deconsolidated the *Endres* appeal from the *Holmes* appeal, vacated its earlier opinion, issued a new opinion in this case, and granted rehearing in *Holmes*. App. A1. The Seventh Circuit panel's new opinion in *Endres*, virtually identical to the *Endres* portion of the consolidated opinion issued prior to the motion for rehearing, was issued on November 19, 2003. App. A1.

Three Judges, however, dissented from the Seventh Circuit's decision not to rehear the *Endres* appeal. Writing for the dissent, Judge Ripple first criticized the panel's "recharacteriz[ation]" of the accommodation Endres sought, correctly noting that Endres did not object to enforcing general vice laws, even in casinos, but instead "simply asked that he not be assigned on a permanent full-time basis to a gambling establishment." App. A11.

The dissent also took issue with the panel's decision to "blue pencil[] the reasonable accommodation requirement from the statute as it applies to police and fire personnel." App. A12. In addition to finding no support for this decision in the text or history of Title VII, the dissent also found no support in the Seventh Circuit's prior Title

VII case law, noting that, in both of the Court's prior Title VII decisions involving law enforcement officers cited by the panel, the court had determined that the employer had offered a reasonable accommodation, rather than intimating that no such action was required. App. A12. Likewise, in examining the law of other Circuits, the dissent noted that no other Circuit Court of Appeals had crafted such an exemption from Title VII — to the contrary, several sister Circuits had followed the reasonable accommodation analysis in deciding similar cases — and that Congress had given no indication that it intended to do so:

> But Congress simply did not determine that these agencies ought to be given a blanket exemption from the mandate of the statute, and, I respectfully suggest, Congress' ability to determine the wisdom of such an exemption is far superior to ours. On a nationwide scale, public safety organizations come in many shapes and sizes. Some are highly professional; some are not. Some are relatively immune from prejudices, be they racial or religious or otherwise; some are not. Congress apparently saw no reason to exempt categorically such organizations from the plain mandate of the statute and preferred that the boundaries of the reasonable accommodation requirement be established in case-by-case adjudication.

App. A13-14.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review To Address The Seventh Circuit's Unwarranted And Unprecedented Exemption From The Religious Accommodation Requirements Of Title VII For Law Enforcement And Other "Paramilitary Employers.

The Seventh Circuit held that task-specific requests for religious accommodation under Title VII made by law enforcement officers, firefighters, and other employees of "paramilitary" organizations are unreasonable *per se*. App.8-11. Thus, in the Seventh Circuit, such employers are now exempt from the religious accommodation provisions of Title VII, even if an accommodation for the employee's religious beliefs would impose no hardship on the employer. App. A5. This judicially-created exemption from the requirements of Title VII is wholly unsupported by the text or history of Title VII and threatens the religious freedom of public servants in the Seventh Circuit.

A. There Is No Support In The Text Or History Of Title VII For A "Blanket Exemption" For "Paramilitary" Employers From The Statute's Reasonable Accommodation Of Religion Requirements.

The Seventh Circuit held: "Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, ... the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations." App. A5. In the words of Judge Ripple, dissenting from the decision to deny rehearing, the panel "simply blue pencils the reasonable accommodation requirement from the statute as it applies to police and fire personnel." App. A12.

The Seventh Circuit arrived at this novel holding by disregarding the most basic, foundational rules of statutory construction, and by substituting its own judgment for that of Congress. *See Robinson v. Shell Oil, Co.*, 519 U.S. 337, 340 (1997) (regarding the Court's approach to interpreting Title VII: "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning .... [O]ur inquiry must cease if the statutory language is unambiguous and the 'statutory scheme is coherent and consistent.'"). The Seventh Circuit did not cite, nor could it have, any basis in the text or history of Title VII to support its novel holding that law enforcement and other "paramilitary" employers are exempt from the religious accommodation requirements of Title VII. App. A13. Nor did the court cite any decisions of this Court or its sister Circuits for that proposition. Indeed, no other federal or state court has ever held that any class of employers are exempt from the religious accommodation requirements of Title VII.

Congress could have created an exemption from Title VII's religious accommodation provisions for law enforcement and other "paramilitary" employers if it desired to do so. Indeed, Congress has done so where it thought appropriate, specifically exempting religious organizations from the categories of employers subject to the religious accommodation provisions of Title VII. 42 U.S.C. § 2000e-1; *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329 (1987).

Congress also has demonstrated that it can and will exempt law enforcement agencies — the same class of employers at issue here — from other accommodation statutes where it deems it appropriate to do so. In 1986 for example, Congress exempted "public safety officers," including law enforcement officers and

firefighters, from certain provisions of the Age Discrimination in Employment Act ("ADEA"). 29 U.S.C. § 631(j) (1988). That Congress exempted some employers from Title VII's religious accommodation requirements, but did not exempt law enforcement agencies, or any other "paramilitary" employers — though it clearly has in other situations where it thought it appropriate — indicates that the lack of such an exemption here was no mere oversight.

Furthermore, Congress has made other, arguably more burdensome, federal civil rights statutes applicable to law enforcement agencies, again strongly suggesting that Congress does not share the Seventh Circuit's concerns about the burden on such employers imposed by Title VII's religious accommodation requirements. The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213, *et. seq.*, and the Rehabilitation Act ("RA"), 29 U.S.C. § 701, *et. seq.*, which prohibit employers from discriminating against individuals on the basis of their disabilities, apply without qualification to state and local law enforcement agencies and fire departments.

Like Title VII, both the ADA and the RA impose upon employers "an affirmative obligation to make a reasonable accommodation for a handicapped employee." *School Bd. of Nassau County v. Arline,* 480 U.S. 273, 289 n.19 (1987) (addressing ADA's accommodation requirements); *Buckingham v. United States*, 998 F.2d 735, 739 (9th Cir. 1993) (addressing RA's accommodation requirements). That Congress has seen no need to relieve law enforcement agencies of the more weighty burdens of accommodation imposed by the ADA and the RA again indicates that Congress does not consider the burden to reasonably accommodate an employee's religion to be necessarily more than a law enforcement agency can bear.

B. The Seventh Circuit's Holding That Task-Specific Requests For Religious Accommodation By Law Enforcement Officers And Other "Paramilitary" Employers Are *Per Se* Unreasonable Will Have Dire Consequences For Religious Freedom In The Seventh Circuit.

As a result of the Seventh Circuit's holding that task-specific requests for religious accommodation by employees of law enforcement agencies or other "paramilitary" organizations are *per se* unreasonable, police officers, firefighters, and others in similar professions in the states composing the Seventh Circuit no longer have a right under Title VII to a reasonable accommodation of their religion by their employers. App. A8,11. Even where the accommodation would impose no burden on the employer, such employees in the states composing the Seventh Circuit now have no legal recourse under Title VII. Indeed, because such Title VII claims brought by law enforcement officers and other "paramilitary" employees will no longer survive the employer's motion to dismiss, future plaintiffs will have little chance of compiling a record to challenge the Seventh Circuit's holding that their accommodation claims are *per se* unreasonable.

Should this Court permit the Seventh Circuit's decision to stand, law enforcement officers, firefighters, and other similar public servants in the states composing the Seventh Circuit will be alone in their exclusion from Title VII's religious discrimination protections. App. A13. These public servants will find their religious freedom in greater peril than those they protect.

Still more disturbing is the lack of any discernible limitation on the Seventh Circuit's Title VII exemption to law enforcement and "paramilitary" employers. The panel opinion states: "[L]aw-

enforcement agencies need the cooperation of all members." App. A8. To the extent that this is universally true of law enforcement agencies, although notably not in the record, this fact is no less true of a number of employers, including hospitals, ambulance services, and even many small businesses. But Title VII takes this into account. It does not require employers to accommodate an employee's religion absolutely. Instead, Title VII relieves employers of that burden if the accommodation would result in an "undue hardship." App. A5. As the panel itself noted, in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 84 (1977), this Court held that Title VII does not require an employer to suffer more than a "*de minimis* cost" to accommodate the employee's religion. App. A5. Nevertheless, the panel's reasoning that, even in the absence of any such minimal hardship, "paramilitary" employers need not accommodate an employee's religion because of their supposed need for complete cooperation would apply with equal force to many other employers.

The panel opinion also recites "the need to hold police officers to their promise to enforce the law without favoritism ...." App. A8. Ignoring that Endres informed Respondent that he had no religious objection to enforcing general vice laws at the casinos, but asked only to be excused from a full-time assignment performing specialized gambling-related duties as a "Gaming Commission Agent," App. D10, the panel equated Endres's claim with that of a hypothetical Black Muslim policeman who refuses to protect Christians and Jews. App. A8. Setting aside the court's mischaracterization of Endres's request for accommodation, App. A11, the need for an employee to fulfill his or her obligations without favoritism based on his or her religious or political beliefs is not limited to law enforcement officers. Certainly, one would hope that doctors, surgeons, nurses, and other members of the health care professions — similarly bound by oath — would not refuse to

treat a patient because they disagreed with the patient's religious beliefs. Thus, the Seventh Circuit's reasoning leaves open the door to extending its judicially-created Title VII exemption to a host of other employers.

II. The Court Should Grant Review To Resolve The Split Between The Seventh Circuit, On One Hand, And The Fourth, Ninth, Tenth, And Eleventh Circuit Courts Of Appeals On The Other Hand, As To Whether Title VII Requests For Religious Accommodation By Law Enforcement Officers Are Unreasonable *Per Se.*

The Seventh Circuit is alone in holding that task-specific requests for religious accommodation by law enforcement officers and other employees of "paramilitary" organizations are unreasonable *per se*. App. A11. As Judge Ripple acknowledged, the decision "sets [the Seventh Circuit] apart from the other circuits with respect to a fundamental aspect of Title VII law...." App. A9. The Fourth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal have upheld the rights of police officers, firefighters, and other public servants to a reasonable accommodation of their religion under Title VII, holding that whether the accommodation is "reasonable" and whether a hardship on the employer would be "undue" are fact-sensitive determinations. *Balint v. Carson City,* 180 F.3d 1047, 1051 (9th Cir. 1999); *Beadle v. City of Tampa,* 42 F.3d 633, 636 (11th Cir. 1995); *Miller v. Drennon,* No. 91-2166, 1992 WL 137578, at *3 (4th Cir. June 19, 1992); *United States v. City of Albuquerque,* 545 F.2d 110, 114 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977). Petitioner submits that this Court should grant review to resolve this split, albeit unbalanced, among the circuits.

A. The Fourth, Ninth, Tenth, And Eleventh Circuits Have Held That Determining Whether A Request For Religious Accommodation By A Law Enforcement Officer Or Firefighter Is "Reasonable" Requires A Fact-Specific Analysis.

In *Balint v. Carson City,* 180 F.3d 1047 (9th Cir. 1999), the Ninth Circuit Court of Appeals, sitting *en banc*, addressed a Title VII religious accommodation claim brought by a Sabbatarian sheriff's deputy against a city sheriff's department. Balint informed the sheriff's department that she could not work from sundown Friday to sundown Saturday, her Sabbath, and requested that her schedule be adjusted to accommodate her religion. *Id.* at 1049. When the department refused any accommodation, Balint filed a complaint alleging religious discrimination in violation of Title VII. *Id.* at 1050. The District Court granted summary judgment for the sheriff's department, holding that any accommodation would be an undue hardship. *Id.*

The Ninth Circuit reversed. *Id.* at 1056. The court first noted that Balint had established a prima facie case of religious discrimination under Title VII, stating that it was undisputed that Balint was denied employment because of her refusal to work on the Sabbath and that the defendant "conceded that it took no steps to accommodate Balint's request for observance of her Sabbath." *Id.* at 1051. The Ninth Circuit rejected the defendant's argument that its seniority system for shift assignments relieved it of any obligation to reasonably accommodate an employee's religious practices. *Id.* at 1053. The court then reversed summary judgment for the defendant, concluding that there was a genuine issue of material fact as to whether a "split-shift" system would be an undue hardship on the defendant. *Id.* at 1056. The Ninth Circuit reaffirmed that "[w]hat constitutes undue hardship must be determined within

the particular factual context of each case." *Id.* at 1054; *see also American Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 775 (9th Cir. 1986) (holding similarly in a Title VII claim involving postal worker).

In *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), the Eleventh Circuit considered a Title VII religious accommodation claim brought by a Sabbatarian police officer against the Tampa Police Department. Beadle requested an alternative assignment that would permit him not to work on his Sabbath, and the department refused any accommodation. *Id.* at 634. Although the court eventually affirmed judgment for the defendant, the Eleventh Circuit held that "the phrases 'reasonable accommodation' and 'undue hardship' are not defined under the statutes, 'each case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably.'" *Id.* at 636 (quoting *United States v. City of Albuquerque,* 545 F.2d 110, 114 (10th Cir. 1976)).

In *City of Albuquerque*, the Tenth Circuit addressed the Title VII religious accommodation claim of a Sabbatarian firefighter. Although the court ultimately affirmed judgment for the defendant, it stated:

> The phrases "reasonably accommodate" and "undue hardship" as used in 42 U.S.C. §2000e(j) are relative terms and cannot be given any hard and fast meaning. Each case necessarily depends upon its own facts and circumstances, and in a sense every case boils down to a determination as to whether the employer has acted reasonably.

City of Albuquerque, 545 F.2d at 114. The Tenth Circuit then reviewed the district court's findings of fact concerning "undue

hardship" and "reasonable accommodation," upholding them as "not clearly erroneous." *Id.* at 115. Finally, the court acknowledged that courts had reached different conclusions as to whether the religious practices of individual Sabbatarians had been reasonably accommodated. *Id.* The court then stated:

> A reading of all these cases leads us to conclude that to a very great degree each case turns on its own particular facts and circumstances. Under the facts and circumstances here present, if we reversed the trial court we would simply be substituting our best judgment of the facts for that of the trial court. This we should not do. Indeed we cannot.

Id.

Finally, in *Miller v. Drennon,* No. 91-2166, 1992 WL 137578 (4th Cir. June 19, 1992), the Fourth Circuit addressed the Title VII religious accommodation claim of a male paramedic whose religious beliefs prevented him from working twenty-four hour shifts in a single bedroom station with a female co-worker. The court held that the accommodations offered by the defendant county's Emergency Medical Services division were reasonable. *Id.* at *3. In reaching this conclusion, the Fourth Circuit held that "[t]he determination of whether an employer has offered a reasonable accommodation depends on the facts of each case ...." *Id.*; *see also* App. A13 (Ripple, J. Dissenting) (citing *Miller*).

B. The Seventh Circuit's Opinion Declares Unreasonable As A Matter Of Law All Requests For Religious Accommodation By Law Enforcement Officers And Other "Paramilitary" Employees.

In stark contrast to the decisions of the Fourth, Ninth, Tenth,

and Eleventh Circuits discussed above, the Seventh Circuit held below that all task-specific requests for religious accommodation by law enforcement officers, firefighters, or other employees of "paramilitary" organizations are unreasonable *per se.* App. A8,11. Notably without citing any of the aforementioned decisions, the Seventh Circuit held: "Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship ... the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations." App. A5. The panel held that Endres's requested religious accommodation was "a demand that it would be unreasonable to require any police or fire department to tolerate." App. A8.

The effect of this difference in the approaches to Title VII religious accommodation claims between the Seventh Circuit and the Fourth, Ninth, Tenth, and Eleventh Circuits cannot be overstated. Courts in the Fourth, Ninth, Tenth, and Eleventh Circuits will examine the particular circumstances and facts of a Title VII religious accommodation claim brought by a police officer, firefighter, or other employee of a "paramilitary" organization. *See supra* Sec. IIA. Hence, because a complaint will survive a motion to dismiss so long as any set of facts, consistent with the allegations in the complaint, could be proven that would state a claim, *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002), it is unlikely that a properly pleaded Title VII religious accommodation claim by a law enforcement officer or firefighter in those circuits would be dismissed for failure to state a claim. This is no longer the case in the Seventh Circuit. As this case illustrates, law enforcement officers, firefighters, and other "paramilitary" employees may no longer even state a valid claim for failure to reasonably accommodate their religious practices under Title VII.

Endres requests no more than that which would be available to

him in any of the other Circuits that have addressed this issue: the opportunity to conduct discovery concerning whether a reasonable accommodation could have been provided to him that would not have imposed an undue hardship on his employer, and to have his Title VII religious accommodation claim evaluated based on its unique facts and circumstances.

III. The Court Should Grant Review To Clarify That Congress Abrogated State Defendants' Eleventh Amendment Sovereign Immunity From Religious Accommodation Claims Under Title VII.

Should review be granted, the Court could limit its review to the issue decided by the Seventh Circuit: whether there are any circumstances under which law enforcement officers and other "paramilitary" employees may state a claim for failure to reasonably accommodate their religious beliefs under Title VII. However, should this Court grant review and decide that question in the affirmative, reversing the Seventh Circuit, the question whether Congress abrogated state sovereign immunity when it enacted the religious accommodation requirements of Title VII would remain. This Court could provide meaningful guidance to the bar and lower federal courts by clarifying that Congress effectively abrogated state sovereign immunity for religious accommodation claims under Title VII.

Respondent moved to dismiss Endres's Title VII claim, arguing that the Eleventh Amendment granted it sovereign immunity from that claim in federal court. App. C4. The district court denied Respondent's motion to dismiss Endres's Title VII claim, holding that Congress had abrogated Respondent's sovereign immunity from Title VII religious discrimination claims. App. C4. The Seventh Circuit declined to address this issue, however, instead deciding that

because Endres was a law enforcement officer, his task-specific request for religious accommodation was unreasonable *per se*. App. A5,11. Nevertheless, in the companion case, *Holmes v. Marion County Office of Family & Children,* originally consolidated with Endres's case on appeal to the Seventh Circuit, the panel held that states retained their sovereign immunity from Title VII religious accommodation claims. App. B17. After the Seventh Circuit granted rehearing *en banc* in *Holmes*, vacating the panel's opinion, the parties settled that case. Thus, whether Congress effectively abrogated sovereign immunity when it enacted the religious accommodation provisions of Title VII will not reach this Court in *Holmes*, and will remain unsettled until clarified by this Court.

Respondent concedes that Congress intended to abrogate sovereign immunity when it enacted Title VII because the statute explicitly provides for a private right of action against state and local governments. App. C4; *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 (1976) (noting that amendments to Title VII "retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf"). Thus, the only question is whether Congress's abrogation of sovereign immunity for Title VII religious discrimination claims was a valid exercise of its authority to enforce the Fourteenth Amendment.

Congress has the authority to abrogate states' sovereign immunity from statutes enacted pursuant to Section 5 of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000). Congress's authority to enforce constitutional rights under Section 5 is broad. *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997). Congress is within its Section 5 authority unless the legislation is "'so out of proportion to a supposed remedial or preventive object that it cannot be

understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 528 U.S. at 82 (quoting *City of Boerne*, 521 U.S. at 532). Although "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern...Congress must have wide latitude in determining where it lies...." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999). Enforcement legislation under Section 5 is appropriate so long as there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

Respondent contends that in light of this Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the religious discrimination provisions of Title VII now sweep more broadly than the Free Exercise Clause of the First Amendment. App. A2. Thus, Respondent argues that to the extent that Title VII requires religious accommodation rather than simple neutrality, it is not Section 5 legislation. App. A 2. Respondent argues that therefore the application of Title VII's religious accommodation requirements to state defendants violates the Eleventh Amendment, relying on this Court's holding in *City of Boerne* regarding the Religious Freedom Restoration Act. App. C7.

As illustrated by the Seventh Circuit panel's holding in *Holmes*, this Court's recent decisions in *Smith* and *City of Boerne* have created uncertainty as to the continued vitality of Title VII's religious discrimination protections against state employers in federal courts. App. B16-17. Until squarely addressed by this Court, uncertainty will remain in the lower courts as to whether state employers may be sued in federal court under Title VII for failure to reasonably

accommodate an employee's religion. Should the Court grant review, it could address this issue in this case, illuminating the bar and the lower courts concerning this critically important issue.

CONCLUSION

The Seventh Circuit has held that task-specific requests for religious accommodation by law enforcement officers, firefighters, and other "paramilitary" employees are unreasonable *per se*. This holding represents a dramatic judicial revision of Title VII, is entirely unsupported by the text and history of that statute, and is in direct conflict with the view of at least four other Circuits. Such an unprecedented, illogical, and unnecessary holding should not be permitted to stand in defiance of Congress's intent and in detriment to the religious freedom of our uniformed civil servants.

For these reasons, Endres respectfully requests that this Court grant certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

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BENJAMIN P. ENDRES, JR., Plaintiff-Appellee, and UNITED STATES OF AMERICA, Intervening Plaintiff-Appellee, v. INDIANA STATE POLICE, Defendant-Appellant.

No. 02-1247

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

349 F.3d 922

November 1, 2002, Argued-Decided June 27, 2003

On Petition for Rehearing -Decided November 19, 2003

This appeal originally was consolidated with No. 02-1377, *Holmes v. Marion County Office of Family and Children*, and the two appeals were decided in a single opinion, which is reported at 334 F.3d 618 (7th Cir. 2003). In response to the petition for rehearing and rehearing en banc, the court has decided to de-consolidate the appeals and to issue a separate opinion in each. The panel's opinion resolving this appeal follows.

All members of the panel have voted to deny the petition for rehearing. A judge in active service called for a vote on the petition for rehearing en banc. A majority did not favor rehearing, so the petition is denied. Judges Ripple, Rovner, and Williams voted to grant rehearing en banc. Judge Ripple has written a dissenting opinion (joined by Judges Rovner and Williams) that immediately follows the panel's new opinion.

Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge*. Benjamin Endres lost his job with the Indiana State Police after he refused to work at a casino, an enterprise that contravenes his religious beliefs. He sued under Title VII of the Civil Rights Act of 1964, contending that Indiana discriminated against him on account of religion. Endres relies on a definition in § 701(j) of that Act, 42 U.S.C. § 2000e(j), which provides that religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Indiana concedes that the State Police must not discriminate against any religious faith but relies on *Employment Division v. Smith*, 494 U.S. 872 (1990), for the proposition that it need not accommodate religiously inspired practices adversely affected by rules that are neutral with respect to religion. To the extent an accommodation requirement extends beyond the first amendment, Indiana insists, it rests on the Constitution's commerce clause and not on § 5 of the fourteenth amendment. That does not undermine § 701(j)'s validity as applied to state employees, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), but does affect where litigation must occur–for, when Congress acts only under the commerce power, the eleventh amendment permits states to insist that suit be in state court. Compare *Fitpatrick v. Bitzer*, 427 U.S. 445 (1976), with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In *Boerne v. Flores*, 521 U.S. 507 (1997), the Court concluded that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to § 2000b-4, exceeds the power granted by § 5 and therefore may not support a private action in federal court against a state. Indiana submits that § 701(j), which like the RFRA requires accommodation rather than neutrality, also is not § 5 legislation. After the United States intervened to defend the constitutionality of

Title VII, the district judge rejected Indiana's argument and held that litigation may proceed in federal court. *Endres v. Indiana State Police*, No. 3:01-CV-0518 (N.D. Ind. Dec. 28, 2001) (unpublished order). The state took an interlocutory appeal. See *Lapides v. University of Georgia*, 535 U.S. 613 (2002); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

Endres joined the State Police in 1991. After Indiana began to license casinos, the State Police designated some of its officers as Gaming Commission agents. In March 2000 Endres was assigned to a full-time position as an agent at the Blue Chip Casino in Michigan City, Indiana. Gaming Commission agents certify gambling revenue, investigate complaints from the public about the gaming system, and conduct licensing investigations for the casinos and their employees. Endres worships at the Community Baptist Church in South Bend; he and other congregants believe they must neither gamble nor help others to do so, because games of chance are sinful. Endres told the State Police that, although he was willing to enforce general vice laws at casinos, providing the specialized services required of Gaming Commission agents would violate his religious beliefs because it would facilitate gambling. He asked for a different assignment; the State Police declined. Endres then refused to report for duty and was fired for insubordination. An assignment to this position because of (rather than in spite of, or with indifference to) his religious beliefs would violate the Constitution, see *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), but Endres does not contend that his religion played any role in the selection. According to the complaint, he was selected by lot. Nor did the State Police hold his views against him after he refused the assignment; it responded to his deeds, not his faith, and Endres does not contend that he was treated more severely than he would have been had he refused the same position for secular reasons. As a result, neither the posting

nor the decision not to accommodate Endres's desire for different duties violated the free exercise clause of the first amendment, as *Smith* understands that clause.

Before taking up the question whether § 701(j) is an exercise of § 5 powers, we first inquire whether § 701(j) obliges states to afford the sort of accommodation that Endres requested. A negative answer will enable the court to avoid a constitutional issue, which makes it prudent to follow the model that the Supreme Court established in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), for qualified-immunity appeals by state actors: determine whether the complaint states a claim before inquiring whether the defendants have immunity. Because the eleventh amendment does not curtail subject-matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapides* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778-80 (2000).

Endres contends that § 701(j) gives law-enforcement personnel a right to choose which laws they will enforce, and whom they will protect from crime. Many officers have religious scruples about particular activities: to give just a few examples, Baptists oppose liquor as well as gambling, Roman Catholics oppose abortion, Jews and Muslims oppose the consumption of pork, and a few faiths (such as the one at issue in *Smith*) include hallucinogenic drugs in their worship and thus oppose legal prohibitions of those drugs. If Endres is right, all of these faiths, and more, must be accommodated by assigning believers to duties compatible with their principles. Does § 701(j) require the State Police to assign Unitarians to guard the abortion clinic, Catholics to prevent thefts from liquor stores, and Baptists to investigate claims that supermarkets mis-weigh bacon and shellfish? Must prostitutes be

left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?

The Supreme Court held in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), that § 701(j) does not require an accommodation that would cause more than minimal hardship to the employer or other employees. See also *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67-69 (1986). Juggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors. Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, however, the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations. Reasonableness and the avoidance of undue hardship are distinct. Cf. *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) (discussing the difference between "reasonable" accommodation and "undue hardship" under the Americans with Disabilities Act). Selective objection to some of the employer's goals raises problems on the "reasonableness" branch as well as the "undue hardship" branch. See *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003). This is especially pertinent when the assignment is unpopular: the State Police had to draft Endres because there were not enough volunteers. Excusing officers from the risk of unpopular assignments would create substantial costs for fellow officers who must step in, as well as the police force as an entity.

This is the third time we have had to consider how § 701(j) applies to requests by law-enforcement personnel to choose which crimes they will investigate and which potential victims they will protect. In *Ryan v. Department of Justice*, 950 F.2d 458 (7th Cir. 1991),

an FBI agent claimed a right to be free of any assignment concerning nonviolent opposition to military activities — such as, for example, protesters who vandalize military installations, see *United States v. Urfer*, 287 F.3d 663 (7th Cir. 2002), or pour blood on military records, see *United States v. Berrigan*, 437 F.2d 750 (4th Cir. 1971). Agent Ryan's views stemmed from the U.S. Bishops' Pastoral Letter on War and Peace; his sincerity was not in doubt. Nonetheless, we held, § 701(j) did not protect him from discharge for insubordination:

> It is difficult for any organization to accommodate employees, who are choosy about assignments; for a paramilitary organization the tension is even greater. Conscientious objectors in the military seek discharge, which accommodates their beliefs and the military's need for obedience. Ryan received discharge but does not want it. He wants to be an agent and to choose his assignments too. With good will all around, and flexibility on the part of Ryan's fellow agents, it just might be possible to make a go of it. Title VII does not, however, compel the FBI to attempt this. Legal institutions lack the sense of nuance that will tell an experienced agent how far the rules may be bent without injury to the FBI's mission. Compelled, as it is by Title VII, to have one rule for all of the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it.

950 F.2d at 462. Our second case was *Rodriguez v. Chicago*, 156 F.3d 771 (7th Cir. 1998). Rodriguez, like Ryan a Roman Catholic, refused to protect abortion clinics and their clients. Again the sincerity of his views was unquestioned; again the officer lost, this time because an accommodation had been offered in the form of an opportunity to transfer to a precinct without abortion clinics

(which avoided the need to determine whether the offer had been required). Chief Judge Posner filed a concurring opinion addressing the question that the majority had ducked and concluding, in part on the authority of *Ryan*, that agencies such as police and fire departments designed to protect the public from danger may insist that *all* of their personnel protect *all* members of the public — that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds. That is, after all, an obligation both state law and the Constitution fasten on the police. If police and fire departments must enforce the law and protect potential victims free of religious favoritism, then they may insist that all members of their forces (volunteers rather than conscripts) do their parts in fulfilling this duty. "[P]ublic protectors such as police and firefighters must be neutral in providing their services." *Shelton v. University of Medicine & Dentistry*, 223 F.3d 220, 228 (3d Cir. 2000).

Perhaps one could say that *Ryan* does not *compel* this conclusion; agent Ryan had been offered one form of accommodation (a swap of assignments with a fellow agent), and officer Endres lacked any similar way out. Yet what principally led to Ryan's discharge (as opposed to lesser discipline) was his failure to follow a direct order, coupled with a claim of entitlement in the future to choose which crimes would be investigated and which potential victims protected. Endres has made a claim of entitlement similar to Ryan's — broader to the extent that Endres claims a right to reject an entire job classification, while Ryan claimed only the right to reject particular investigations — and Endres's employer has not offered a similar accommodation. Certainly nothing in *Ryan* or *Rodriguez* implies that there *must* be such an offer: those cases deemed proffered accommodations adequate and did not reach the question whether any had been necessary. Here, where no accommodation was attempted, we must decide whether the statute requires one, and we hold that it does not. Endres has made a demand that it

would be unreasonable to require any police or fire department to tolerate.

Law-enforcement agencies need the cooperation of all members. Even if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover for selective objectors, or when (as in *Hardison*) seniority systems or limits on overtime curtail the options for shuffling personnel. Beyond all of this is the need to hold police officers to their promise to enforce the law without favoritism — as judges take an oath to enforce *all* laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.

> The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty — that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.

Rodriguez, 156 F.3d at 779 (Posner, C.J., concurring). And, we add, that Baptist policemen protect gamblers from theft and fraud (and casino operators from sticky-fingered gamblers and employees with falsified credentials). Cf. *Gillette v. United States*, 401 U.S.

437 (1971) (selective conscientious objection does not excuse military service).

Endres advanced a claim under 42 U.S.C. § 1983 as well as one under Title VII. The Indiana State Police, as a unit of state government, is not a "person" as § 1983 uses that term and therefore is not amenable to a suit for damages under that statute. See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There is no point in remanding to allow Endres to fix this problem by adding other defendants. His claim under the free exercise clause is incompatible with *Smith*, and only § 701(j) offered any prospect of success. The district court's disposition of Endres's suit therefore is reversed outright; his complaint fails to state a claim on which relief may be granted.

The decision of the district court is reversed, and the case is remanded with instructions to enter judgment for the State Police on the merits.

RIPPLE, *Circuit Judge*, with whom ROVNER and WILLIAMS, *Circuit Judges*, join, dissenting from the denial of rehearing en banc. Today, the court declines to rehear en banc a case that departs significantly from this court's fundamental approach to statutory interpretation. In doing so, it sets our court apart from the other circuits with respect to a fundamental aspect of Title VII law and deprives those who serve us in important public safety positions from a protection that they enjoy in every other circuit in the United States. For the reasons set forth in the following paragraphs, I respectfully dissent from the denial of rehearing en banc.

Benjamin Endres was an officer for the Indiana State Police. After Indiana began to license casinos, the State Police designated some of its officers as Gaming Commission Agents. In March 2000, Mr. Endres was designated as a Gaming Commission Agent and was

assigned *full time* to the Blue Chip Casino in Michigan City, Indiana. Mr. Endres is a Baptist; he believes that gambling is a sin and that he must neither gamble nor help others to do so. As admitted by the court, although Mr. Endres did not object to enforcing general vice laws on casino property, Mr. Endres informed his supervisors that providing full-time services at the casino would violate his religious beliefs; he, therefore, requested a different assignment. The State Police refused. When Mr. Endres failed to report for duty, he was fired for insubordination. Mr. Endres subsequently filed suit under Title VII and claimed that the State of Indiana failed to accommodate reasonably his religious beliefs.

In addressing his claim, the panel first noted, correctly, that "§ 701(j) does not require an accommodation that would cause more than minimal hardship to the employer or other employees." *Endres v. Indiana State Police*, No. 02-1247, slip op. at 5 (7th Cir. Nov. 19, 2003) (citing *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)).

However, it then continued:

> Juggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to managers and difficult for other officers who would be called on to fill in for the objectors. Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, however, the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations.

Id. Comparing Mr. Endres' request to that of the plaintiff in *Ryan v. Department of Justice*, 950 F.2d 458 (7th Cir. 1991), the panel

held that such a request is per se unreasonable in the context of a police or fire department. *See id.* at 5-6.

The panel's disposition of Mr. Endres' accommodation claim contains several crucial errors. First, the panel recharacterizes the scope of the accommodation that Mr. Endres sought. Mr. Endres simply asked that he not be assigned on a permanent, full-time basis to a gambling establishment; he did not seek to avoid all law enforcement activity with respect to a casino. Consequently, his request did not either require the ongoing "[j]uggling [of] assignments" or involve an officer choosing which law he would enforce — elements of Mr. Endres' claim that the panel found so troubling.

The panel's resolution also fails to adhere to the established law of this and every other circuit. Employing a less polemical characterization, this court has twice addressed accommodations that must be offered to law enforcement personnel who seek to avoid specific assignments on religious grounds. Most recently in *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998), we addressed the request of a Catholic police officer to be exempted from assignments at abortion clinics. In evaluating the City's alleged failure to accommodate, we reiterated the standard to be applied:

> Under Title VII, therefore, an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business. Accordingly, we turn first to the issue of whether the City has satisfied its duty of reasonable accommodation; only if we answer that question in the negative need we proceed to the "undue hardship" prong of the Title VII analysis.

Id. at 775. Applying this standard, we determined that the City had satisfied its duty of reasonable accommodation because, under the existing collective bargaining agreement, the officer in question could have secured a transfer to a district without an abortion clinic without any reduction in his level of pay or benefits. *See id.* In an earlier case, *Ryan v. United States Department of Justice*, 950 F.2d 458 (7th Cir. 1991), we reached a similar conclusion. Ryan was a Federal Bureau of Investigation agent who, on religious grounds, "repeatedly refused to carry out a lawful order to investigate an unsolved federal offense; he declined to swap assignments; he would not promise to carry out similar orders in the future...." 950 F.2d at 461. Although seeking to be removed from the investigation of any peaceful, antiwar protestors, "Ryan proposed no course other than discontinuing investigations of the sort to which he is opposed, which would be capitulation rather than accommodation." *Id.* Under these circumstances, we determined the FBI had not failed to accommodate Ryan's religious beliefs.

Notably absent from our resolution of either Rodriguez's or Ryan's claim, however, was a holding that the agencies were exempt from the statutory requirement of reasonable accommodation because of their law enforcement mission. Indeed, the panel in *Endres* acknowledges that "*Ryan* does not *compel*" its conclusion. *Endres*, slip op. at 8. Quite the opposite, *Ryan* acknowledged the unreasonableness of the request to cease investigations when the perfectly reasonable solution of an assignment swap had been proposed and rejected.

Not only does the panel's decision here abandon the analytical framework of *Rodriguez* and *Ryan*, it also ignores the clear language of the statute. It simply blue pencils the reasonable accommodation requirement from the statute as it applies to police and fire personnel. It relies on no language of the statute, no

interpretive regulation, no legislative history. It simply constructs a categorical statutory amendment where none exists. Congress took a different view. Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...religion." 42 U.S.C. § 2000e-2(a)(1). Furthermore, Title VII's definition of religion includes "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate...an employee's...religious observance or practice without undue hardship on the conduct of the employer's business." *Id.* § 2000e(j). Neither the definition of religion nor the definition of employer in § 2000e(b), suggests that law enforcement agencies, fire departments, or any other "paramilitary" employers are exempt from the reasonable accommodation provisions. Consequently, a law enforcement exception to the reasonable accommodation requirement finds no support in the plain language of Title VII.

I have no doubt that public safety agencies have a great deal of latitude in accommodating the religiously based requests of their employees for exemptions from particular duties. Both our previous case law and the case law of the other circuits make that proposition clear.[1] But Congress simply did not determine that

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1 *See, e.g., Shelton v. Univiversity of Medical & Dentistry of New Jersey*, 223 F.3d 220, 228 (3d Cir. 2000) (finding public hospital had reasonably accommodated Pentecostal nurse opposed to assisting with emergency abortions by offering her different assignment); *Beadle v. City of Tampa*, 42 F.3d 633, 637 (11th Cir. 1995) (applying reasonable accommodation analysis and holding that excusing Seventh Day Adventist officer from all Friday evening and Saturday shifts would work an undue hardship); *Miller v. Drennon*

these agencies ought to be given a blanket exemption from the mandate of the statute, and, I respectfully suggest, Congress' ability to determine the wisdom of such an exemption is far superior to ours. On a nationwide scale, public safety organizations come in many shapes and sizes. Some are highly professional; some are not. Some are relatively immune from prejudices, be they racial or religious or otherwise; some are not. Congress apparently saw no reason to exempt categorically such organizations from the plain mandate of the statute and preferred that the boundaries of the reasonable accommodation requirement be established in case-by-case adjudication.

The court's decision to let this panel decision stand will raise, regretfully, many questions in the minds of many people. Public safety and emergency personnel, whose contributions to our daily lives are so much more appreciated these days, have every right to ask why this court has signaled them out as not deserving of a statutory protection guaranteed to every other person in the United States. Members of minority religions, whose doctrines are not well-understood or appreciated in our culture, may well wonder whether municipalities within this circuit are the best place in which to make a public contribution. Hopefully, these doubts will be lessened by enlightened municipal management who certainly could ensure that those who serve us are protected despite this court's decision to depart from the anti-discrimination standards enforced in the rest of the United States.

1992 WL 137578 (4th Cir. June 19, 1992) (applying reasonable accommodation analysis and finding that county had offered reasonable accommodations to emergency medical worker who was opposed to sharing one-room apartment with a member of the opposite sex when on twenty-four hour shifts).

Members of the practicing judiciary and the practicing bar in this circuit also will be puzzled by this court's departure from its usual methodology in interpreting statutes. Time and time again, we profess that, in interpreting a statute, we begin with the plain wording of the statute. Unless there is an ambiguity, we apply the explicit command of Congress. No one suggests that Congress has left any doubt as to what it expects in this situation. Unfortunately, however, our current decisional behavior does not follow the course of our rhetoric. In future cases, judges, attorneys, and litigants will have to accept the reality that they must observe not what we say, but what we do.

B1

BENJAMIN P. ENDRES, JR., Plaintiff-Appellee, and UNITED STATES OF AMERICA, Intervening Plaintiff-Appellee, v. INDIANA STATE POLICE, Defendant-Appellant. PATRICIA HOLMES, Plaintiff-Appellee, and UNITED STATES OF AMERICA, Intervening Plaintiff-Appellee, v. MARION COUNTY OFFICE OF FAMILY AND CHILDREN, Defendant-Appellant.

Nos. 02-1247, 02-1377
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

334 F.3d 618

November 1, 2002, Argued
June 27, 2003, Decided

Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Benjamin Endres lost his job with the Indiana State Police after he refused to work at a casino, an enterprise that contravenes his religious beliefs. Patricia Holmes, an employee of Indiana's child welfare system, took two days of paid leave rather than comply with a directive to remove a headwrap required by her faith. Endres and Holmes have sued under Title VII of the Civil Rights Act of 1964, contending that Indiana discriminated against them on account of their religion. Plaintiffs rely on a definition in § 701(j) of that Act, 42 U.S.C. § 2000e(j), which provides that religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's

religious observance or practice without undue hardship on the conduct of the employer's business."

Both defendants concede that they have a duty not to discriminate against any religious faith but rely on *Employment Division v. Smith*, 494 U.S. 872 (1990), for the proposition that they need not accommodate religiously inspired practices adversely affected by rules that are neutral with respect to religion. To the extent an accommodation requirement extends beyond the first amendment, defendants insist, it rests on the Constitution's commerce clause and not on § 5 of the fourteenth amendment. That does not undermine § 701(j)'s validity as applied to state employees, see *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), but does affect where litigation must occur — for, when Congress acts only under the commerce power, the eleventh amendment permits states to insist that suit be in state court. Compare *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), with *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In *Boerne v. Flores*, 521 U.S. 507 (1997), the Court concluded that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb to § 20000bb-4, exceeds the power granted by § 5 and therefore may not support a private action in federal court against a state. Defendants submit that § 701(j), which like the RFRA requires accommodation rather than neutrality, also is not § 5 legislation. After the United States intervened to defend the constitutionality of Title VII, each district judge rejected Indiana's argument and held that litigation may proceed in federal court. *Endres v. Indiana State Police*, No. 3:01-CV-0518 (N.D. Ind. Dec. 28, 2001) (unpublished order); *Holmes v. Marion County Office of Family and Children*, 184 F. Supp. 2d 828 (S.D. Ind. 2002). Defendants took interlocutory appeals. See *Lapides v. University of Georgia*, 535 U.S. 613 (2002); *Puerto Rico Aqueduct & Sewer Authority v. Metcald & Eddy, Inc.*, 506 U.S. 139 (1993). We consolidated the cases for briefing and argument.

I.

Endres joined the State Police in 1991. After Indiana began to license casinos, the State Police designated some of its officers as Gaming Commission agents. In March 2000 Endres was assigned to a full-time position as an agent at the Blue Chip Casino in Michigan City, Indiana. Endres worships at the Community Baptist Church in South Bend; he and other congregants believe they must neither gamble nor help others to do so, because games of chance are sinful. Endres told the State Police that providing law-enforcement services at a casino would violate his religious beliefs because it would facilitate gambling. He asked for a different assignment; the State Police declined. Endres then refused to report for duty and was fired for insubordination. The record does not reflect why Endres was deputed as a Gaming Commission agent, but he does not contend that this occurred because of, rather than in spite of, his religiously based opposition to gambling. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Nor did the State Police hold his views against him; it responded to his deeds, not his faith, and Endres does not contend that he was treated more severely than he would have been had he refused the same assignment for secular reasons. As a result, neither the posting nor the decision not to accommodate Endres's desire for different duties violated the free exercise clause of the first amendment, as *Smith* understands that clause.

Before taking up the question whether § 701(j) is an exercise of § 5 powers, we first inquire whether § 701(j) obliges states to afford the sort of accommodation that Endres requested. A negative answer will enable the court to avoid a constitutional issue, which makes it prudent to follow the model that the Supreme Court established in *Saucier v. Katz*, 533 U.S. 194, 201 (2001), for qualified-immunity appeals by state actors: determine whether the

complaint states a claim before inquiring whether the defendants have immunity. Because the eleventh amendment does not curtail subject matter jurisdiction (if it did, states could not consent to litigate in federal court, as *Lapides* holds that they may), a court is free to tackle the issues in this order, when it makes sense to do so, without violating the rule that jurisdictional issues must be resolved ahead of the merits. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 778-80 (2000).

Endres contends that § 701(j) gives law-enforcement personnel a right to choose which laws they will enforce, and whom they will protect from crime. Many officers have religious scruples about particular activities: to give just a few examples, Baptists oppose liquor as well as gambling, Roman Catholics oppose abortion, Jews and Muslims oppose the consumption of pork, and a few faiths (such as the one at issue in *Smith*) include hallucinogenic drugs in their worship and thus oppose legal prohibitions of those drugs. If Endres is right, all of these faiths, and more, must be accommodated by assigning believers to duties compatible with their principles. Does § 701(j) require the State Police to assign Unitarians to guard the abortion clinic, Catholics to prevent thefts from liquor stores, and Baptists to investigate claims that supermarkets mis-weigh bacon and shellfish? Must prostitutes be left exposed to slavery or murder at the hands of pimps because protecting them from crime would encourage them to ply their trade and thus offend almost every religious faith?

The Supreme Court held in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), that § 701(j) does not require an accommodation that would cause more than minimal hardship to the employer or other employees. See also *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67-69 (1986). Juggling assignments to make each compatible with the varying religious beliefs of a heterogeneous police force would be daunting to

managers and difficult for other officers who would be called on to fill in for the objectors. Whether or not a paramilitary organization could accommodate task-specific conscientious objection without undue hardship, however, the demand would not be reasonable — and § 701(j) calls only for reasonable accommodations. Reasonableness and the avoidance of undue hardship are distinct. Cf. *Vande Zande v. Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) (discussing the difference between "reasonable" accommodation and "undue hardship" under the Americans with Disabilities Act). Selective objection to some of the employer's goals raises problems on the "reasonableness" branch as well as the "undue hardship" branch. See *Reed v. Great Lakes Cos.*, 330 F.3d 931 (7th Cir. 2003).

This is the third time we have had to consider how § 701(j) applies to requests by law-enforcement personnel to choose which crimes they will investigate and which potential victims they will protect. In *Ryan v. Department Of Justice*, 950 F.2d 458 (7th Cir. 1991), an FBI agent claimed a right to be free of any assignment concerning nonviolent opposition to military activities — such as, for example, protesters who vandalize military installations, see *United States v. Urfer*, 287 F.3d 663 (7th Cir. 2002), or pour blood on military records, see *United States v. Berrigan*, 437 F.2d 750 (4th Cir. 1971). Agent Ryan's views stemmed from the U.S. Bishops' Pastoral Letter on War and Peace; his sincerity was not in doubt. Nonetheless, we held, § 701(j) did not protect him from discharge for insubordination:

> It is difficult for any organization to accommodate employees who are choosy about assignments; for a paramilitary organization the tension is even greater. Conscientious objectors in the military seek discharge, which accommodates their beliefs and the military's need for obedience. Ryan received discharge but does not want

> it. He wants to be an agent and to choose his assignments too. With good will all around, and flexibility on the part of Ryan's fellow agents, it just might be possible to make a go of it. Title VII does not, however, compel the FBI to attempt this. Legal institutions lack the sense of nuance that will tell an experienced agent how far the rules may be bent without injury to the FBI's mission. Compelled, as it is by Title VII, to have one rule for all of the diverse religious beliefs and practices in the United States, the FBI may choose to be stingy with exceptions lest the demand for them overwhelm it.

950 F.2d at 462. Our second case was *Rodriguez v. Chicago*, 156 F.3d 771 (7th Cir. 1998). Rodriguez, like Ryan a Roman Catholic, refused to protect abortion clinics and their clients. Again the sincerity of his views was unquestioned; again the officer lost, this time because an accommodation had been offered in the form of an opportunity to transfer to a precinct without abortion clinics (which avoided the need to determine whether the offer had been required). Chief Judge Posner filed a concurring opinion addressing the question that the majority had ducked and concluding, in part on the authority of *Ryan*, that agencies such as police and fire departments designed to protect the public from danger may insist that *all* of their personnel protect *all* members of the public — that they leave their religious (and other) views behind so that they may serve all without favor on religious grounds. That is, after all, an obligation both state law and the Constitution fasten on the police. If police and fire departments must enforce the law and protect potential victims free of religious favoritism, then they may insist that all members of their forces (volunteers rather than conscripts) do their parts in fulfilling this duty. "[P]ublic protectors such as police and firefighters must be neutral in providing their services." *Shelton v. University of Medicine & Dentistry*, 223 F.3d 220, 228 (3d Cir. 2000).

Perhaps one could say that *Ryan* does not *compel* this conclusion; agent Ryan had been offered one form of accommodation (a swap of assignments with a fellow agent), and officer Endres lacked any similar way out. Yet what principally led to Ryan's discharge (as opposed to lesser discipline) was his failure to follow a direct order, coupled with a claim of entitlement in the future to choose which crimes would be investigated and which potential victims protected. Endres has made the same claim of entitlement as Ryan did; it is, we hold, a claim that it would be unreasonable to require any police or fire department to tolerate.

Law-enforcement agencies need the cooperation of all members. Even if it proves possible to swap assignments on one occasion, another may arise when personnel are not available to cover for selective objectors, or when (as in *Hardison*) seniority systems or limits on overtime curtail the options for shuffling personnel. Beyond all of this is the need to hold police officers to their promise to enforce the law without favoritism — as judges take an oath to enforce *all* laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.

> The public knows that its protectors have a private agenda; everyone does. But it would like to think that they leave that agenda at home when they are on duty — that Jewish policemen protect neo-Nazi demonstrators, that Roman Catholic policemen protect abortion clinics, that Black Muslim policemen protect Christians and Jews, that fundamentalist Christian policemen protect noisy atheists and white-hating Rastafarians, that Mormon policemen protect Scientologists, and that Greek-Orthodox policemen of Serbian ethnicity protect Roman Catholic Croats. We

> judges certainly want to think that U.S. Marshals protect us from assaults and threats without regard to whether, for example, we vote for or against the pro-life position in abortion cases.

Rodriguez, 156 F.3d at 779 (Posner, C.J., concurring). And, we add, that Baptist policemen protect gamblers from theft and fraud (and casino operators from sticky-fingered gamblers and employees). Cf. *Gillette v. United States*, 401 U.S. 437 (1971) (selective conscientious objection does not excuse military service).

Endres advanced a claim under 42 U.S.C. § 1983 as well as one under Title VII. The Indiana State Police, as a unit of state government, is not a "person" as § 1983 uses that term and therefore is not amenable to a suit for damages under that statute. See *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). There is no point in remanding to allow Endres to fix this problem by adding other defendants. His claim under the free exercise clause is incompatible with *Smith*, and only § 701(j) offered any prospect of success. The district court's disposition of Endres's suit therefore is reversed outright; his complaint fails to state a claim on which relief may be granted.

II

Holmes has a much better claim for accommodation. Her complaint, the only thing we have to go on, alleges: "August 13, 1998, I wore a geles (headwrap) as part of my religious practice. My supervisor, Teresa Howard, informed me if I didn't remove my headgear I would be written up for insubordination for violating a dress code policy. I informed Ms. Howard that due to religious reasons I could not take my geles off. I had to take two vacation days to avoid being disciplined." Although the Constitution does not compel a public employer to allow religious headcoverings that

violate neutral dress codes, see *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Menora v. Illinois High School Association*, 683 F.2d 1030 (7th Cir. 1982), toleration of religious diversity in this respect is a wise policy in a pluralistic society. See *United States v. James*, 328 F.3d 953, 957-58 (7th Cir. 2003). Accommodation would be reasonable. Whether Indiana could establish "undue hardship" is not at issue this early in the case. It is enough to say that the complaint survives any challenge under Rule 12(b)(6), so we must decide whether further litigation takes place in state rather than federal court.

A

Before doing this, however, we need to say more about our own jurisdiction. There are two potential problems, even taking as given the holding of *Lapides* and *Puerto Rico Aqueduct & Sewer Authority* that a state's invocation of the eleventh amendment normally permits an interlocutory appeal.

The first is that the case is in federal court to stay. Holmes alleged, after the language we have quoted: "Other employees wore headgear or hats and were not threatened as I was." That disparate-treatment claim does not depend on the accommodation rule in § 701(j). Indiana concedes that it may be litigated in federal court, because Title VII is § 5 legislation to the extent it enforces the Constitution's own rule against religious discrimination. One may wonder what sense it makes to entertain an interlocutory appeal about a single line of legal argument even though another theory requires the same defendant to litigate in the same court no matter how the appeal comes out. Holmes advances only one claim for relief, supported by multiple legal theories, each of which (if successful) would lead to the same money damages: two days' pay. But *Behrens v. Pelletier*, 516 U.S. 299, 311-12 (1996), says that an interlocutory immunity appeal may contest a single theory of

liability, even though success will not end the case, at least if the potential relief differs — and Holmes's victory on an accommodation theory would lead to prospective relief different from what would follow victory on a disparate-treatment theory. After *Behrens*, the fact that a defendant is not asserting an unqualified "right not to be tried in federal court" does not preclude an interlocutory appeal based on a claim of immunity.

Second, and more complex, is the question whether the Marion County Office of Family and Children, the defendant in Holmes's suit, *is* the State of Indiana. If, as its name implies, it is a unit of county rather than state government, then it gets no benefit from the eleventh amendment, see *Lincoln County v. Luning*, 133 U.S. 529 (1890), and is amenable to suit in federal court whether or not § 701(j) "enforces" the fourteenth amendment. See *University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001).

Twenty-five years ago we ruled that Indiana's county welfare departments are not "the state" for purposes of the eleventh amendment. See *Mackey v. Stanton*, 586 F.2d 1126, 1130-31 (7th Cir. 1978). In 1986 Indiana revised the organization of its child-welfare system; county welfare departments became county offices of family and children, and their workers became state employees. *Baxter v. Vigo County School Corporation*, 26 F.3d 728, 732-33 (7th Cir. 1994), holds that these changes do not affect *Mackey*'s conclusion: these organizations are still units of local rather than state government, principally because the money to pay for child-welfare services comes from local taxes.

Relying on *J.A.W. v. Indiana*, 687 N.E. 2d 1202 (Ind. 1997), the state asks us to overrule *Baxter*. The Supreme Court of Indiana concluded in *J.A.W.* that we misunderstood how the state's child-welfare system is organized after the 1986 legislation. That law, *J.A.W.* concluded, made all family-welfare officials full-fledged state

employees in a chain of command that extends to the Governor. All of these workers are paid directly from the state treasury. County offices are part of the state in such a structure in the same way the Indianapolis office of the Department of Health and Human Services is part of the federal government. Some taxes to raise funds for welfare benefits are collected at the local level, but *J.A.W.* holds that the county acts in this respect as an agent of the state: "county governments were largely rendered tax collectors for the State" (687 N.E.2d at 1213). "When the county departments were transformed into subordinate agencies of the state[] in 1986, the county governments became — with respect to these activities — financial agents of the state. We so hold as a matter of state law." *Id.* at 1215.

Indiana's system brings to mind the way the United States apportioned direct taxes among the states before the sixteenth amendment. Sharing of authority among units of government complicates both practical administration and legal characterization. Even if as a matter of state law the counties act as agents of the state in raising and remitting revenues, it remains a matter of federal law whether this makes each county's department part of the State. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). The dispositive question is more "who pays?" than "who raised the money?". See *University of California v. Doe*, 519 U.S. 425 (1997) (if state pays, the fact that the money came to the state from the federal Treasury does not matter). We need not decide whether *J.A.W.* alone would cause us to overturn the holding of *Baxter*, however, because Indiana changed its law again in 2000.

Baxter relied principally on I.C. 12-19-3-2, which established a welfare fund in each county. The fund was raised by a tax on all taxable property in the county, plus the issuance of bonds secured by future property taxes, see I.C. 12-19-3-12 through 12-19-3-16.

These provisions were repealed effective January 1, 2000, by I.C. 12-19-1-21. Counties still have the ability to levy taxes to fund certain services (the fund is called the "family and children's fund"), but that money is used only for "child services." I.C. 12-19-7-3. "Child services" is a defined term, see I.C. 12-19-7-1, that does not include any personnel or administrative costs. These come exclusively from the state treasury. See I.C. 12-19-1-8 and 12-19-1-9. The damages Holmes seeks therefore would be paid by the state itself. (The events of which she complains occurred in 1998, but Indiana charges damages against current appropriations). The combination of *J.A.W.* and the 2000 legislation leads us to conclude that county offices of family and children in Indiana now must be classified as part of the state for purposes of the eleventh amendment. This does not require the overruling of *Baxter*, which dealt with superseded legislation. It is enough to say that the statutes now in force makes county offices part of the state, as *J.A.W.* held and as the formal organization chart now shows them.

B

Thus we arrive at the question whether a claim against a state, based on the accommodation clause of § 701(j), may be litigated in federal court. The parties' dispute concerns venue, not substance: it is the validity of § 701(a), to the extent it authorizes private parties to sue a state in federal court, and *not* the validity of § 701(j), that is at issue — for legislation based on the commerce clause may be applied to states (as employers) via suits brought by the federal government in federal court, or via private suits in state courts that are already open to litigation against the state. See *Alden v. Maine*, 527 U.S. 706 (1999).

Indiana's argument is a simple one. Section 5 of the fourteenth amendment authorizes Congress to "enforce" the other provisions of that amendment. A requirement of accommodation does not

"enforce" the free exercise clause (applied to the states by § 1 of the fourteenth amendment), for *Smith* holds that a state complies with the free exercise clause by maintaining neutrality toward religiously motivated practices. Accommodation means *departure* from neutrality, and *Boerne* accordingly holds that the Religious Freedom Restoration Act is not based on the power to "enforce" the fourteenth amendment. In *Boerne* not a single justice thought that a statutory demand for accommodation could be deemed a law to "enforce" the free exercise clause as *Smith* had interpreted it; the only seriously debated question was whether to overrule *Smith* (which the Court did not do). Likewise *Garrett* holds that the Americans with Disabilities Act, to the extent it requires accommodation rather than disregard of disabilities, does not rest on the § 5 enforcement power. See also *Erickson v. Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000). Indiana asks us to equate accommodation under § 701(j) with accommodation under the RFRA and the ADA.

Plaintiffs and the United States reply that § 701(j) can be enforcement legislation even though it departs from the Constitution's own rules, provided that it is "congruent and proportional" to them — in other words, that it is a reasonable way to prevent evasions of constitutional rules. See *Nevada Department of Human Resources v. Hibbs* 1972 (2003), which holds that the family-leave provisions of the Family and Medical Leave Act may be sustained under the § 5 power because they root out sex-based stereotypes. The Court stressed in *Hibbs* that Congress compiled a legislative record showing that many states used to discriminate explicitly on account of sex and may continue to do so (either subconsciously or deliberately but in disguise) in the absence of preventive legislation. Family leave is "congruent" to the constitutional rule because designed to reduce the scope for stereotypical thinking and "proportional" because it imposes a modest requirement: family leave is limited in time and is unpaid.

Limits built into § 701(j) satisfy the proportionality element of this analysis: § 701(j) demands much less of a state than the RFRA did (and less than the FMLA does, too). The RFRA demanded that the state show a compelling interest, while under *Hardison* even a slight burden is "undue hardship." Yet the employer's burden under § 701(j) is identical to that under the ADA, which *Garrett* held to be unsupported by § 5. So we must inquire whether § 701(j) is "congruent" to the free exercise clause, even though the RFRA was not (and the ADA's accommodation rule has been held not congruent to the equal protection clause).

The idea behind "congruence" is that Congress may respond to a history of concealable violations by adopting precautionary rules that reduce either the chance of evasion or the influence of lingering stereotypical beliefs. Congress can't change the constitutional rule of decision, but it may add teeth so that the Constitution's rule has practical bite. Many violations of the equal protection clause are concealable, for disparate impact is not actionable, and the disparate-treatment rule requires proof of intent to use the forbidden characteristic. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976). When stereotypical thinking underlies a decision, the line between disparate treatment and disparate impact blurs, and it may be difficult indeed to prove a claim. The Court held in *Hibbs* that, when a history of real discrimination has been documented, § 5 permits Congress to address established patterns of stereotypical thinking without requiring proof of discriminatory intent.

Section 701(j) does not fit that model. Discrimination by public employers against their employees' religiously inspired practices does not have the same history as discrimination on account of race or sex, and states rarely have resorted to legislation with a veneer of neutrality designed to mask a forbidden discriminatory plan. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), offers one of the few examples — and as it was not enough

to persuade the Court that the RFRA matches a constitutional problem, it is hard to see why § 701(j) would be congruent to a constitutional problem. (Note that *Lukumi Babalu Aye* itself had nothing to do with employment by state agencies.) *Hibbs* stressed that, before enacting the FMLA, Congress had compiled a record of subtle sex discrimination reflected in employers' leave policies. Before enacting Title VII, Congress had not compiled such a record of subtle discrimination against religious practices. In 1964, the legislature concentrated on race discrimination; religion and sex were afterthoughts. There was no legislative record at all in the Senate, where the bill was not referred to committee, lest it be bottled up by opponents.

The United States concedes that before enacting Title VII Congress did not compile *any* legislative record on the question whether states were violating their constitutional obligations with respect to religious practices in public workplaces. If the history were written elsewhere for all to see, as the history of race and sex discrimination is, then the lack of a legislative record could not matter. Often a "legislative record" reflects only the ability of advocacy groups to have favorable tidbits recited by tame witnesses during staged hearings. Members of Congress are not professional historians; they do not conduct scholarly research or even make findings after the fashion of juries. Legislative "records" are compiled but not evaluated, voted on, or presented to the President (or the judiciary) for approval. Section 5 does not condition legislative power on the ability of interest groups or committee chairmen to ladle anecdotes into hearing transcripts. Legislative power under § 5 depends on the state of the world, not the state of the Congressional Record.

Yet the Executive Branch did not file in this court a brief that supplies the details missing from the legislative record; nor does the United States' brief point to any scholarly writings that illuminate the history. We have been given no reason whatever to think that

subtle, hard-to-catch, discrimination against religious practices is now, or ever has been, a problem in state employment. Although hostility to Catholicism was common in many states during the nineteenth century, and some states adopted local versions of the Blaine Amendment, see *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion), that period was behind us long before the enactment of Title VII. For much of the twentieth century, public employers *counteracted* religious discrimination in the private sector, hiring those who had difficulty finding private jobs suited to their skills. The foundation for a decision such as *Hibbs* is missing with respect to § 701(j).

Logic does not furnish what history lacks. An accommodation requirement does not reinforce the constitutional approach; to the contrary, neutrality (which is both necessary to avoid disparate treatment and, under *Smith*, sufficient to avoid any violation) differs substantially from accommodation. Neutrality is blind to religion; accommodation requires consciousness of religion and entails a demand that believers and non-believers receive different treatment. One Justice believes that, for this reason, accommodation is itself a violation of the establishment clause. See *Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring). Though this is a minority view, all of the other Justices recognize that there is a difference and a potential tension between an anti-discrimination rule and an accommodation requirement. So in the absence of some need to use accommodation to counteract evasions of the anti-discrimination principle, § 701(j) cannot be called an ancillary rule that is congruent with the constitutional norm that Congress is entitled to enforce. This means that § 701(j) rests on the commerce clause alone, and that § 701(a) therefore may not be used to compel a state to defend in federal court a private suit seeking accommodation of a religious practice. Holmes has not named any state official as a defendant in order to seek prospective relief, contrast *Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th

Cir. 2003) (discussing the application of *Ex parte Young*, 209 U.S. 123 (1908)), so all variations of the accommodation theory belong in state court.

The decision of the district court in *Endres* is reversed, and that case is remanded with instructions to enter judgment for the State Police on the merits. The decision of the district court in *Holmes* is vacated, and that case is remanded with instructions to dismiss that portion of the complaint that deals with failure to accommodate, while retaining that portion of the complaint that deals with disparate treatment.

C1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

BENJAMIN P. ENDRES, JR.,	)	
	)	
Plaintiff,	)	
	)	
	)	Cause No. 3:01-CV-0518
INDIANA STATE POLICE,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Benjamin Endres says that when the Indiana State Police fired him for refusing to guard a casino, the police violated his right to reasonable accommodation of his religious beliefs, a right protected by federal employment laws. Mr. Endres also says that the firing breached his employment contract. Because the court disagrees with the State Police's argument that Congress had no authority to require states to make reasonable efforts to accommodate their employees' religious beliefs, the court denies the motion to dismiss Mr. Endres's claim under federal law. Because the constitution prohibits federal courts from deciding cases brought against states under state law, the court grants the motion to dismiss Mr. Endres's breach of contract claim.

Mr. Endres, a member of the Community Baptist Church, believes that gambling is a vice that contravenes his deeply held religious principles. Some time after Mr. Endres became an Indiana State Police officer in 1991, the State Police entered into an

agreement with the Indiana Gaming Commission under which the State Police would supply officers to act as Gaming Commission agents at Indiana casinos. In March 2000, the State Police assigned Mr. Endres as a Gaming Commission Agent at the Blue Chip Casino. Mr. Endres protested the assignment and told the State Police that his religious beliefs prevented him from taking the assignment. The State Police refused Mr. Endres's request to accommodate him by finding him another assignment. Mr. Endres declined to accept the assignment to work at the casino and was fired for refusing to comply with orders.

Mr. Endres alleges that the State Police refused to accommodate him, then fired him, because of his religious convictions.[1] He says his firing contravenes Title VII, 42 U.S.C. § 1983, and Indiana's civil rights act. Ind. Code 22-9-1-3. Mr. Endres also says his firing breached his employment contract with the State Police.

The State Police moved to dismiss Benjamin Endres' complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The State Police asked the court to direct the United States to intervene because its motion challenged the constitutionality of an Act of Congress, specifically 42 U.S.C. §

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1 The State Police say Mr. Endres's claim is based only on failure to accommodate and not on disparate treatment, so the court need only address his failure to accommodate claim. To assert a disparate treatment claim, a plaintiff must allege that his employer discriminated against him with respect to his compensation, terms, condition, or privileges of employment" because of his religion." 42 U.S.C. § 2000e-2(a). Mr. Endres's complaint is entitled to a reading in his favor, and when so read, alleges that he was forced to quit because of the consequences of his religious beliefs.

2000e(j). The court granted the United States' motion to intervene, and the United States filed its brief in support of the constitutionality of 42 U.S.C. § 2000e(j).

The State Police don't address Mr. Endres' state civil rights claim, but say the court should dismiss his federal religious discrimination claims because Congress exceeded its authority by abrogating the states' Eleventh Amendment immunity when it made it unlawful for states to discriminate on the basis of religion. The State Police also say that the Eleventh Amendment bars Mr. Endres's breach of contract claim.

> Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...religion. Religion, in turn, includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate...an employee's...religious observance or practice without undue hardship on the conduct of the employer's business. Under Title VII, therefore, an employer must reasonably accommodate an employee's religious observance or practice unless it can demonstrate that such accommodation would result in an undue hardship to the employer's business.

Rodriguez v. City of Chicago, 156 F.3d 771, 775 (7th Cir. 1998) (citations omitted).

Under the Eleventh Amendment to the United States Constitution, a state can't be sued in federal court by any individual — including its own citizens — without its consent. *Varner v.*

Illinois State University, 226 F.3d 927, 929 (7th Cir. 2000). States are immune from having to defend suits by private parties in federal courts, except when Congress "unequivocally expresses its intent to abrogate the immunity." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996). Congress's power of abrogation is limited; for the constitutional protection to be deemed abrogated, Congress must have acted "pursuant to a valid exercise of power." *Seminole Tribe v. Florida*, 517 U.S. at 55.

In abrogating the states' immunity from suit under Title VII, Congress exercised its power to enforce the Fourteenth Amendment, which gives Congress the power to enforce that Amendment by appropriate legislation. U.S. CONST. AMEND. 14 § 5. The State Police concede that Congress intended Title VII to apply to the states as defendants when it amended the act in 1972, *see Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976), so the sole question for the court is whether Congress validly exercised its § 5 power when it prohibited religious discrimination by states under Title VII. *See Varner v. Illinois State*, 226 F.3d at 930.

"Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Varner v. Illinois State*, 226 F.3d at 930 *quoting City of Boerne v. Flores*, 521 U.S. 507, 518 (1997). "Congress' power to enforce the Fourteenth Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Varner v. Illinois State*, 226 F.3d at 930 *citing Kimel v. Florida Board of Regents*, 528 U.S. 62, 63 (2000). Congress's power under § 5 is limited to enforcing the restrictions set out by the Fourteenth Amendment; it doesn't give Congress the authority to determine what is or is not a

Constitutional violation. *Varner v. Illinois State*, 226 F.3d at 930.

For Congress's exercise of its § 5 authority to be valid, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997). The State Police say Congress didn't satisfy this test because the legislative record of 42 U.S.C. § 2000e(j) doesn't reveal evidence of a pattern of religious discrimination in this country and because the remedies Congress provided for under Title VII are out of proportion to the harm it seeks to remedy. The State Police say the court should overturn this provision of Title VII for the same reason that the Supreme Court overturned the Religious Freedom Restoration Act. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Congress does not need to make a legislative record of a need for remedial legislation to act under § 5 of the Fourteenth Amendment. "Congress can enact legislation under § 5 enforcing the constitutional right to free exercise of religion." *City of Boerne v. Flores*, 521 U.S. at 519. The question is whether the scheme of the challenged law is remedial, preventative, or "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent unconstitutional behavior." *City of Boerne v. Flores*, 521 U.S. at 532. The line is not always easy to draw, so Congress is afforded "wide latitude in determining where it lies." *City of Boerne v. Flores*, 521 U.S. at 519-520.

The State Police say Title VII's prohibition on religious discrimination is similar to that in RFRA, which prohibited state and local governments from "substantially burdening" one's exercise of religion---even if the burden took the form of facially neutral legislation ---unless the government could demonstrate its action is in furtherance of a compelling government interest and that its action

was the least restrictive means of furthering that interest. *City of Boerne v. Flores*, 521 U.S. at 515-516. Congress exceeded its § 5 authority in enacting RFRA because the law was an attempt to create a substantive change in constitutional protection, rather than a law designed to prevent or remedy unconstitutional behavior. *City of Boerne v. Flores*, 521 U.S. at 532. "The stringent test RFRA demand[ed] of state laws reflect[ed] a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *City of Boerne v. Flores*, 521 U.S. at 533.

Title VII's prohibition, in contrast, fits comfortably within the wide latitude afforded Congress to remedy and prevent constitutional violations. Title VII requires employers — including the states — not to refuse to hire, fire, or otherwise treat an employee differently in compensation, terms, condition, or privileges of employment because of the employee's religion. 42 U.S.C. § 2000e-2(a). Employers also must take reasonable steps to accommodate employees' religious observances or practices as long as it doesn't cause the employers undue hardship. *Rodriguez v. City of Chicago*, 156 F.3d 771, 775 (7th Cir. 1998).

Unlike the legislation that has run afoul of the Eleventh Amendment, such as the ADEA, Title VII seeks to prevent the infringement — by state employers as well as other employers — of well-established rights under the first Amendment to the United States Constitution. *See McPhaul v. Board of Com'rs of Madison County*, 226 F.3d 558, 566 n.6 (7th Cir. 2000); *Helland v. South Bend Community Sch. Corp.*, 93 F.3d 327, 329-330 (7th Cir. 1996). The State Police has not convinced the court that Title VII's religion provisions so burdens the states as to redefine or expand state employees' constitutional rights. The court does not find that Congress exceeded its authority in enacting 42 U.S.C. § 2000e(j), so the State Police's motion to dismiss on that ground

is denied, and Mr. Endres may proceed on his federal claims of religious discrimination.

The State Police say they are immune from Mr. Endres's breach of contract suit, or alternatively that Mr. Endres has not stated a valid claim for breach of contract. Mr. Endres alleges that the State Police entered into an employment contract with him and gave him an employee handbook, and that these documents created a duty to deal with him fairly and in good faith.

The State Police rely on the Eleventh Amendment's prohibition. *Welch v. Texas Department of Highways*, 483 U.S. 468, 472 (1987). Because the Indiana State Police is an agency of the state of Indiana, a suit against the State Police is constitutionally indistinguishable from a suit against the state of Indiana. *Crenshaw v. Supreme Court of Indiana*, 170 F.3d 725 (7th Cir. 1999); *Ryan v. Illinois Dept. of Children and Family Svcs.*, 185 F.3d 751 (7th Cir. 1999). Mr. Endres agrees that sovereign immunity normally would bar his suit, but says that *Welch* is no bar to his suit because his breach of contract claim is supplemental to his federal claim. Mr. Endres is correct that 28 U.S.C. § 1367 authorizes federal courts to exercise supplemental jurisdiction over state law claims a federal court otherwise would have no statutory power to hear, but the impediment to Mr. Endres's claim is a constitutional bar, not a statutory vacuum. Mr. Endres points to no authority that Congress circumvented the Eleventh Amendment when it enacted 28 U.S.C. § 1367 (which is not borne of § 5 of the Fourteenth Amendment). Mr. Endres seeks to sue a state in federal court, and the Eleventh Amendment says the federal court has no authority to hear that claim. The court dismisses Mr. Endres's breach of contract claim.

The State Police didn't seek to dismiss Mr. Endres' state law civil rights claim, *see* IND. CODE 22-9-1-3, but the Eleventh

Amendment would seem no less a bar to that claim than to the breach of contract claim. Since the issue goes to the court's very power to hear the claim, *see Higgins v. Mississippi*, 217 F.3d 951 (7th Cir. 2000), the court affords Mr. Endres fourteen days from the date of this order to show cause why his state civil rights claim should not be dismissed under the Eleventh Amendment, as well.

For the reasons set forth above, the court GRANTS IN PART AND DENIES IN PART Indiana State Police's motion to dismiss [Docket No. 5]. Count two of the complaint is dismissed and this case shall proceed on count one only. The plaintiff is afforded fourteen days from the date of this order within which to show cause why his claim under IND. CODE 22-9-1-3 should not be dismissed, as well.

SO ORDERED

ENTERED: December 28, 2001

/s/

Robert L. Miller, Jr., Judge
United States District Court

cc: D. Kolbe
S. Wilson
C. Johnson
A. Schuham

D1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

CAUSE NO. 3:01CV0518RM

BENJAMIN P. ENDRES, JR.
Plaintiff

vs.

INDIANA STATE POLICE,
Defendant

Filed July 17, 2001

COMPLAINT

COMES NOW, the Plaintiff, Benjamin P. Endres, Jr., by and through his legal counsel, and for his Complaint against the Defendant states:

1. That Plaintiff, Benjamin P. Endres, Jr. is an individual who resides at 64454 Miami Road, Bremen, Indiana.

2. That Defendant, the Indiana State Police, is an entity created by and operating under the laws of the State of Indiana (I.C. 10-1-1-1).

3. That this action arises under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C.A Section 1983; 42 U.S.C.A Section 2000e) and I.C. 22-9-1-3, as hereinafter more fully appears.

4. That Plaintiff is qualified to file this Complaint having

received a "right to sue letter" dated April 18, 2001, and having filed this action within 90 days of the receipt thereof the same of which is attached hereto as Exhibit "1".

COUNT I
RELIGIOUS DISCRIMINATION

5. That in July 1991, Plaintiff was hired by Defendant, the Indiana State Police and, shortly thereafter, successfully passed the requirements and was certified as an Indiana State Trooper.

6. That the Defendant, at all times relevant herein, was vested by the State of Indiana with authority to establish official policy with respect to certain matters concerning job assignments and to make final decisions in regard to the implementation and execution of such policies, including policies involving job assignments.

7. After Plaintiff became an employee of the Defendant, the Indiana State Police, that the Defendant and the Indiana Gaming Commission entered into an agreement whereby personnel of the Indiana State Police would act as Gaming Commission Agents for the Indiana Gaming Commission.

8. That the Plaintiff is, and was at all times relevant herein, a member in good standing of the Community Baptist Church in South Bend, Indiana, a bonafide religious organization that holds as a tenant of its faith the position that gambling is a vice which is contrary to the principles of the Bible and that its members should not, in any way, participate in and/or facilitate gambling.

9. That in March 2000, the Plaintiff received notification from the Defendant of his assignment as a Gaming Commission Agent to the Blue Chip Casino, in Michigan City, Indiana.

10. That Plaintiff, both prior to receiving the official assignment and after, informed the Defendant of his religious convictions and beliefs that would prevent him from accepting the assignment as a Gaming Commission Agent.

11. That Plaintiff requested from Defendant an alternative assignment than that as a Gaming Commission Agent.

12. That the Defendant failed or refused to attempt to make any reasonable accommodation to Plaintiff's sincerely held religious beliefs.

13. That Plaintiff was charged by Defendant with refusal to comply with a written order and insubordination, and subsequently terminated from his employment.

14. That the above described actions of the Defendant constitute unlawful employment discrimination on account of religion in violation of 42 U.S.A. Section 2000e, 42 U.S.A. Section 1983, and I.C. 22-9-1-3.

15. As a result of the aforesaid termination and the acts of the Defendant, Plaintiff has sustained a deprivation of rights, privileges, and immunities secured by the First, Fifth, and Fourteenth Amendments of the Constitution of the United States, and Article I of the Constitution of the State of Indiana.

16. As a result of the aforesaid termination the Plaintiff has been stigmatized in a manner which will hinder his ability to obtain new employment in either the public or private sector.

17. That as a result of the aforesaid termination and acts of the Defendant, Plaintiff has sustained lost earnings and pay along with other pecuniary losses in the form of lost income, benefits, profits,

and other material damages and said damages and losses are expected to continue into the future.

18. That as result of aforesaid termination and the acts of the Defendant, Plaintiff has sustained nonpecuniary losses including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and such nonpecuniary losses as may be disclosed in discovery.

19. That aforesaid acts were performed by the Defendant with malice and/or with intentional indifference and/or with reckless indifference to the civil rights, state and federal, of the Plaintiff.

COUNT II
BREACH OF CONTRACT

20. That Plaintiff incorporates by reference paragraphs 1-19 herein as if fully set out herein and further alleges:

21. That the Defendant entered into an employment contract with the Plaintiff and gave to the Plaintiff an employee handbook. These documents created an implied in fact and implied in law covenant of good faith and fair dealing.

22. That the Defendant breached these covenants by firing the Plaintiff due to his religious beliefs and by failing to accommodate those beliefs, and by breaching the contract denied the Plaintiff of his rights under the contract to wages and benefits.

WHEREFORE, the Plaintiff respectfully requests judgment against the Defendant for compensatory damages in the amount of $250,000.00 including back pay, reinstatement of employment, front pay if reinstatement is not made, punitive damages, attorney fees, expert fees, pre-judgment interest, interest, costs and other

such relief as will redress the actions of the Defendant and as the Court deems just.

JURY DEMAND

The Plaintiff herewith demands a jury trial as to all issues triable by jury.

Respectfully submitted,

/s/

David C. Kolbe
Attorney for Plaintiff
302 West Center Street
Warsaw, IN 46580
Atty No. 5459-43
(219)267-5353 Telephone
(219)268-9293 Telefax

E1

U.S. Department of Justice

Civil Rights Division

Employment Litigation Section
P.O. Box 65968
Washington, mDC 20035-5968
www.usdoj.gov/crt/emp/emphome.html

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

April 18, 2001

WRY: WBF:mdw
DJ 170-265-99

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Benjamin P. E. Endres, Jr.
64454 Miami Road
Bremen, Indiana 46506

Re: Benjamin P. E. Endres, Jr. v. Indiana
State Police, EEOC No. 240-AO-1254

Dear Mr. Endres:

The Civil Rights Division has completely reviewed the file referred to us by the Equal Employment Opportunity Commission (EEOC) in its investigation of your charge of discrimination, and it

has been determined that we will not file suit in this particular matter against the respondent. This should not be taken to mean that the Department of Justice has made a judgment as to whether or not your charge is meritorious.

You are hereby notified that conciliation in this matter was unsuccessful by the EEOC. You are further notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent. If you choose to commence a civil action, such suit must be filed in the appropriate court within 90 days of your receipt of this Notice.

Therefore you should consult an attorney of your own choosing at your earliest convenience. If you are unable to locate an attorney, you may wish to contact the EEOC, or apply to the appropriate court, since that court may appoint an attorney in appropriate circumstances under Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1).

We are returning the file in this matter to EEOC's Indianapolis District Office. If you or your attorney have any questions concerning this matter or wish to inspect the investigative file, please feel free to address your inquiry to: Danny G. Harter, District Director, EEOC, 101 W. Ohio Street, Suite 1900, Indianapolis, IN 46204-4203.

Sincerely,

William R. Yeomans
Acting Assistant Attorney General
Civil Rights Division

/s/
By: William B. Fenton
Deputy Chief
Employment Litigation Section

cc: David Kolbe, Esq.
Attorney for Charging Party

Anthony Sommer, Esq.
Attorney for State of Indiana

F1

U.S. Equal Employment Opportunity Commission
Indianapolis District Office

101 West Ohio Street, Suite 1900
Indianapolis, IN 46204-4203
(317) 226-7212
TTY (317) 226-5162
FAX (317) 226-7953

June 7, 2000

Mr. Benjamin P. Endres, Jr. Charge Number 240A01265
64454 Miami Road
Bremen, Indiana 46506 Charging Party

Indiana State Police
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana 46204-2259 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The charge alleges that the Respondent discriminated against the Charging Party in violation of Title VII of the 1964 Civil Rights Act, as amended, in that Respondent failed to provide Charging Party a reasonable accommodation for his religious beliefs, and discharged him, because of his religion.

The evidence supports the Charging Party's allegation that Respondent failed to reasonably accommodate Charging Party's religious beliefs. Evidence does not support Respondent's contention that to accommodate Charging Party would result in an undue hardship. The evidence also supports Charging party's allegation that he was discharged because of his religion. Based on this, I have determined that there is reasonable cause to believe that Respondent violated Title VII of the 1964 Civil Rights Act, as amended.

Having determined that there is reasonable cause to believe that the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process. Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with Section 706(b) of Title VII and Section 1601.26 of the Commission's Procedural Regulations. Where the Respondent declines to enter into settlement discussions, or when the Commission's representative for any other reason is unable to secure a settlement acceptable to the office Director, the Director shall so inform the parties in writing and advise them of the court enforcement alternative available to the Charging Party and the Commission.

On Behalf of the Commission:

June 7, 2000
Date

/s/
Danny G. Harter,
District Director

cc: Lieutenant Michael F. Reedus
EEO Officer, Indiana State Police
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana 46204-2259